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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. . . . **78-1373**

MID-CONTINENT SPRING COMPANY OF KENTUCKY
Petitioner,

v.

JANE MITCHELL
Respondent.

**CONDITIONAL CROSS-PETITION FOR
A WRIT OF CERTIORARI**
To the United States Court of Appeals for the Sixth Circuit

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The Respondent, Mid-Continent Spring Company of Kentucky, petitions for a writ of certiorari to review that part of the judgment of the United States Court of Appeals for the Sixth Circuit which affirms the District Courts decision that Petitioner Jane Mitchell was unlawfully discharged, but only if the Court grants Jane Mitchell's Petition in Case No. 78-1233, which the Respondent is opposing.

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. A, p. 1a21a) is reported at 583 F. 2d 275. The opinion of the District Court (Pet. App. B, p. 22a-32a) was entered on November 26, 1974,

and is unreported. The Judgment of the District Court (Pet. App. C, p. 33a-36a) was entered on October 14, 1976 and is also unreported.

JURISDICTION

The judgment of the Court of Appeals (Pet. App. D, p. 37a) was entered on September 8, 1978, and rehearing and rehearing en banc was denied on November 9, 1978 (Pet. App. E, p. 38a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether or not an employer engages in an unlawful practice by discharging an employee at a time when said employee is soliciting other employees to file charges against the employer with the United States Equal Employment Opportunity Commission, notwithstanding the fact that the employer was without knowledge of the discharged employee's conduct?

STATUTES INVOLVED

The relevant portions of Section 704(a) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-3(a) is set forth below:

“(a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful

employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.”

STATEMENT OF THE CASE

This cause began when Petitioner called the Department of Labor and spoke to an investigator concerning practices and policies of Petitioner (R. 139-140). Following the Department of Labor investigation, the agent came to Mitchell and advised her he thought he found some signs of discrimination and that he knew a “man in Louisville” who could assist her (R. 169-170). Thereafter, Petitioner received a call at her home from another federal agent (R. 141). In the course of the conversation, Mitchell injected Louise McGehee’s name, without that person’s knowledge or consent, simply because the first investigator had earlier suggested that women be transferred to other jobs and Mid-Continent had complied by moving Louise McGehee (R. 172-174 and 141-142). Thereafter, Mitchell received a written communication from the U.S. Equal Employment Opportunity Commission containing charge forms prepared for herself and McGehee to sign (R. 144-146 and 152; Plf. Exh. 1, R. 145, 883; Plf. Exh. 2, R. 146, 884; and Plf. Exh. 3, R. 152, 885).

At all relevant times, Mitchell did not know there was any difference or distinction between the United States Department of Labor and United States Equal Employment Opportunity Commission (R. 188-189) and 210). Nevertheless, shortly before her discharge, Mitchell went to work and purportedly in the company of Sandra Brown, approached Louise McGehee and told her she:

“had some papers for her to sign because she was working with the men and she told me she wasn’t getting her regular pay of the men and I asked her if she would sign these papers that they had sent. They told me to tell her to sign them if she would.” (R. 148).

Louise McGehee, who had been asked to sign a paper which she did not understand and which she had not seen had declined because she did not want "to fool, . . ., with signing one, . . ., in the plant; . . ." (R.261 and 265). Thereafter, McGehee began to hear rumors about her name being on some "papers" (R. 267-268). Because of these rumors, McGehee reported to Clyde Warren, her foreman, that she had been solicited by Mitchell and that she had been asked to sign a paper which request she had refused (R. 268-269). McGehee told Warren that she did not know what the paper was about, but that it had something to do with men's and women's wages (R. 269-270). Word of this solicitation subsequently reached the Superintendent,¹ who was under the assumption that it was done in the plant during working hours which would have constituted a violation of the company rule against soliciting on company time and property (R. 509-510 and Plf. Exh. 7, R. 207, 895).

The Superintendent then sent for Jane Mitchell and asked if she was passing out papers to be signed, and upon receiving an affirmative answer asked her to show him the papers. Mitchell refused to show the documents or to reveal or otherwise disclose in any manner the object of her solicitation (R. 510-511). Although Mitchell denied she was soliciting on company time, she did not deny soliciting on company property and the Superintendent resolved to terminate her because he was angered by her conduct in the context of her previous disputes with other employees (R. 512-514). Consequently, Jane Mitchell was terminated on August 11, 1969 (R. 135).

REASONS FOR GRANTING THE WRIT

The District Court found Mitchell's discharge to have violated either the Fair Labor Standards Act, §15(a) (3), 29 U.S.C. §215(a) (3) or Title VII of the Civil Rights Act of 1964, as amended, §704(a), 42 U.S.C. §2000e-3(a) because Respondent "knew enough to suspect she was cooperating" with one

¹ Ward Mitchell, not related to Petitioner.

of the two government agencies involved.² The Court of Appeals affirmed only the finding that a violation of Title VII occurred, deeming it unnecessary to pass upon the FLSA claim.³ The operative statute makes unlawful any employment discrimination because an employee:

“ . . . made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this subchapter.”⁴

However, it is also incumbent upon a Court to find that the employer “intentionally engaged” in an unlawful employment practice before it may enjoin the same and order affirmative relief such as reinstatement and backpay. 42 U.S.C. §2000e-5(g). Unquestionably, it is also necessary for a respondent to have discharged an employee with an “intention” to retaliate against the employer for “protected activity”. While such unlawful intention may not require specific malice it nevertheless stands to reason that an employer must at least be knowledgeable of the so-called “protected activity” on the part of the employee, otherwise, it cannot be logically concluded that he had the requisite intention and unlawful motive.

In at least two recent Title VII decisions employers were found not guilty of an unlawful employment practice by reason of retaliation where it appeared that the employer was unaware of any “protected activity” pursuant to Title VII on the part of a particular employee. *Darden v. GTE Sylvania, Inc.*, No. 74-3226, 10 FEP 1099 (N.D. Ga. 1974) affirmed without comment 514 F. 2d 1070 (5th Cir. 1975); and *Wilson v. Woodward Iron Co.*, 362 F. Supp. 886 (N.D. Ala. 1973).

The issue from the outset in this case has centered around a claim by Mitchell that her discharge was motivated by the filing of a charge with the U.S. Equal Employment Opportunity Commission (Second Amended Complaint, R. 14). However,

² Pet. App. B, p. 24a, ¶9 and 27a, ¶6.

³ Pet. App. A, p. 55a-6a.

⁴ U.S.C. §2000e-3(a).

the evidence plainly indicates that the Complaint was not filed until the day of her discharge, August 11, 1969 (Compare R. 38 with Plf. Exh. 3, R. 30, 885 time stamped August 11, 1969). Even more to the point is the overwhelming and virtually undisputed evidence that Mitchell herself did not know that she was soliciting for, or filing, a charge with the EEOC. Thus, Mitchell believed she was soliciting a charge to be filed with the U.S. Department of Labor. Mid-Continent being totally unaware of Mitchell's solicitation of, or filing a charge for, any federal agency at the time of her discharge could not possibly have concluded that her discharge was motivated by her activity protected by Title VII. Moreover, Mid-Continent's earnest attempts to discover the nature of Mitchell's solicitation was fruitless due to Mitchell's failure to cooperate which led the District Court to reduce her back pay award (Pet. App. B, p. 31a, ¶19). Had Mitchell provided the requisite employer knowledge of her so-called "protected activity" she might never have been fired. Thus, Mitchell's intransigence not only brought about her discharge but deprives her of the protection she now seeks to invoke.

Respondent by no means concedes that action preparatory to the filing of a charge is protected by the Act as a threshold question might well arise as to whether or not the solicitation of another person to file a charge with the EEOC is activity protected under the statute. *Cf. NLRB v. Schrivner*, 405 U.S. 117 (1972) FN. 2. However, without attempting to plumb to finite meanings of the Act, it would seem sufficient to note that Respondent could not possibly have fired Mitchell for any of those activities enumerated therein when it had no knowledge of such activities. Thus, the lack of employer knowledge is a fundamental element which Mitchell failed to establish and use to successfully prosecute a case under the statute. This Court has recognized the logic presented here when deciding a similar question of discrimination under the National Labor Relations Act, that an employee would be shown to have been unlawfully discharged:

" . . . if it is shown that the discharged employee was at the time engaged in a protected activity, that the employer

knew it was such, . . .” *NLRB v. Burnup and Simms, Inc.*, 379 U.S. 21, 23, 85 S. Ct. 171 (1964).

Decisions concerning similar questions under the Labor Management Relations Act are both appropriate and instructive in Title VII cases. *McDonnell-Douglas Corporation v. Green*, 411 U.S. 792, 91 S. Ct. 1817 (1973).

It is well established that an employer may discharge an employee for good cause, bad cause, or no cause at all so long as the discharge does not violate a statute prohibiting discharge. See *e.g. Truax v. Raich*, 239 U.S. 33 (1915); and *NLRB v. McGahey*, 233 F.2d 406, 412-413 (5th Cir. 1956). Accordingly, it was error to find that Petitioner was unlawfully discharged.

CONCLUSION

Should the Writ be granted pursuant to the Petition herein, the issues before the Court should include those set forth in this Conditional Cross-Petition.

Respectfully submitted,

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